

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

**In re: Mitchell R. Miller, M.D.
a/k/a Mitch Miller**

Docket No.: MPC 76-1100

SUMMARY DECISION AND ORDER

This order responds to the State's Motion for Summary Suspension of the medical license of Mitchell R. Miller, M.D., a/k/a Mitch Miller and Motion to Seal.

Procedural History

On March 31, the State, represented by the Office of the Attorney-General (Attorney-General), filed the above referenced Motions with the Board of Medical Practice (the Board), accompanied by a Specification of Charges, an affidavit and an exhibit. A copy was sent by the Attorney-General to the Respondent Dr. Miller by U.S. mail.

On April 1, 2009, at its regularly scheduled monthly meeting, the Board held an emergency hearing to consider the State's Motions.

Appearances: Marjorie Power, Esq., served as Presiding Officer. Assistant Attorney General James Arisman appeared for the State of Vermont. Respondent did not appear nor was he represented by counsel.

The Board members hearing this matter are identified in the Board meeting minutes for this date. The members of the Board's Central Investigative Committee were not present during the hearing or deliberations, and did not participate in this decision. The Assistant Attorney General was resent at the hearing, but was not present during the Board's deliberations.

The Board has based its decision and Order on the factual allegations in the State's Motions and Specification of Charges, the accompanying Affidavit of the State's Investigator Philip J. Ciotti (Exhibit A), and Exhibit 1 to the Specification of Charges, and additional sworn testimony given by Investigator Ciotti at the hearing.

Allegations of Fact and Findings

1. The factual allegations in Paragraphs 1 through 224 of the Specification of Charges are incorporated herein by reference.
2. The factual allegations in the Affidavit of the State's Investigator Philip J. Ciotti (Exhibit A) are incorporated herein by reference.

3. In summary, these allegations of fact, if proven, would show the Respondent as a physician who abuses his professional privileges as follows:

- a. The respondent has prescribed narcotics (DEA Schedule II and III opioids) over long periods for a number of patients without adequate medical evaluation, subsequent supervision, and/or documentation that meet ordinary standards of care.
- b. The respondent has prescribed these narcotics without consideration of the effect on the patients of possible dependency, adverse side effects, and/or interactions of the numbers of different drugs, the frequency, and/or the quantities he was prescribing.
- c. The respondent has prescribed these narcotics in such numbers, quantities, and frequency that suggest that he has ignored or failed to recognize possible drug seeking behavior and drug abuse by these patients. On the contrary, he has prescribed in a manner that would facilitate such behavior.
- d. The respondent has prescribed these narcotics in such numbers, quantities, and frequency that suggest that he has ignored or failed to recognize possible drug diversion for use and/or abuse by individuals who are not his patients and for whom such drugs may not be medically indicated. On the contrary, he has prescribed in a manner that would facilitate such use.
- e. The respondent has continued to see patients under substandard conditions at an office that he says is closed.
- f. In addition to seeing patients at his office, the respondent is employed or under contract to Prison Health Services, Inc., a Tennessee corporation. In this capacity, the respondent works full time providing medical services to the Southern State Correctional Facility in Springfield, Vermont, where his patients are inmates of the prison who may be particularly vulnerable to inadequate or substandard care and/or abusive prescribing.
- g. Since 2004, the respondent has operated his medical practice in breach of the numerous undertakings he made in his letter of assurance, dated April 26, 2004, to the Central Investigative Committee of the Board, which had opened an investigation of his prescribing practices in November, 2000 (Exhibit 1 to the Specification of Charges). He not only failed to conduct his future practice in conformity with these commitments, but misrepresented his current practices in that very letter. He further made inconsistent, false and/or misleading statements to the Board's investigator about his implementation of his commitments.

4. At the hearing, Investigator Ciotti testified that his most recent investigations showed that the Respondent continued this alleged course of conduct through the middle of March 2009, when he wrote for narcotics prescriptions in breach of his 2004 undertakings to the Board that were

dated and filed as late as March 23, 2009.

5. The documentary materials already filed, and evidence, including testimony, which maybe given in this case, contain information which could directly or indirectly identify the Respondent's patients and reveal their private health information.

Conclusions of Law and Decision

Motion for Summary Suspension

The State has brought a Specification of Charges against the Respondent. The State has also moved that the Respondent's license to practice medicine in Vermont be suspended on an emergency basis pending the resolution of the proceedings relating to those charges, citing 3 V.S.A. §314, which reads in pertinent part:

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.

In making its decision, the Board undertook a two stage analysis of the State's factual allegations. First, to trigger the Board's power to grant a summary suspension of the Respondent's license, the State's Motion for Summary Suspension, the Board must make a preliminary finding that the misconduct alleged in the Specification of Charges, if proven, would result in a finding of unprofessional conduct under 26 V.S.A. §1354 sufficiently serious to support, not one of the lesser penalties set out in 26 V.S.A. §1361, but a determination that the Respondent's license to practice medicine should be subject to "revocation, suspension, annulment, or withdrawal." 3 V.S.A. §314.

The Board reviewed the State's Specification of Charges and determined that, if proven, would constitute unprofessional conduct under a number of provisions of 26 V.S.A. §1354, which include, but may not be limited to: selling, prescribing, giving away or administering drugs for other than legal and legitimate therapeutic purposes; conduct which evidences unfitness to practice medicine; willfully making and filing false reports or records in his or her practice as a physician; in the course of practice, gross failure to use and exercise on a particular occasion or the failure to use and exercise on repeated occasions, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred; failure to comply with provisions of federal or state statutes or rules governing the practice of medicine; performance of unsafe or unacceptable patient care; failure to conform to the essential standards of acceptable and prevailing practice.

The Board determined that the State alleges conduct that, if proven (without defenses or mitigating circumstances), would be sufficiently egregious to support a decision to revoke or suspend the Respondent's license, pursuant to 26 V.S.A. §1361(b).

Second, the Board considered whether immediate action was warranted to protect the public. To make this determination, the Board reviewed the history of the Respondent's alleged prescribing practices and professional conduct toward his patients. This history shows that complaints relating to the Respondent's prescribing of narcotics were first brought to the attention of the Board in 2000 and that an investigation by the Central Investigating Committee resulted in a 2004 letter of assurance from the Respondent outlining the steps he had taken and would continue to take to reform his practices. The State alleges that most of these promised reforms were never put into effect and that the Respondent covered up his failure by misleading and/or false statements and documentation. The Board, concerned to determine whether the alleged practices were past or whether they were likely to continue, requested oral testimony from Investigator Ciotti, as to how recently he had investigated the Respondent's narcotic prescribing activities. Investigator Ciotti testified that his investigation showed the Respondent's alleged prescribing practices continued up to at approximately two weeks before the filing of the Specification of Charges.

The Board further considered whether the continuation of Respondent's alleged prescribing practices and other areas of substandard care were sufficiently inimical to the public health, safety, and welfare to require emergency action pending the outcome of this proceeding. The Board found that the Respondent's alleged practices could threaten the public in a number of ways. If proven, the Respondent's alleged substandard medical care and inadequate supervision of the patients whom he treated at his office threatened their health, safety and welfare. His alleged excessive prescribing in terms of numbers of drugs, amount, and frequency, increased the risk that potent narcotic drugs would find their way to the black market and be used by the purchasers without medical supervision and without knowledge of or regard to side effects, interactions, or overdoses, with the consequent threat to the users' health, safety, and welfare. Further, the Board found that Respondent's alleged history of excessive narcotic prescribing and other substandard care rendered his current position as the physician charged with the medical care of inmates at the Springfield prison a threat to the health, safety, and welfare of this very vulnerable population.

The Board further determined that nothing in the Respondent's professional history suggests that the Board can rely on his previous undertakings to cease his course of alleged unprofessional conduct. Accordingly, based on the allegations of fact and conclusions of law set out above, the Board finds that the public health, safety, or welfare imperatively requires emergency action to suspend the Respondent's license to practice medicine in the State of Vermont pending the outcome of these proceedings.

Motion to Seal

Because much of the evidentiary material in this case may tend to identify the patients of the Respondent and reveal information about their physical or mental conditions, contrary to their reasonable expectations of privacy, the State filed a Motion to Seal the materials in this case to protect the identity of the Respondent's patients from public disclosure.

Mindful of the tension between patients' reasonable expectations of privacy for their private medical information and the statutory provisions favoring of such privacy, 12 V.S.A. §1612, and the statutory provisions requiring the public accessibility of materials relating to the Board's disciplinary proceedings, 26 V.S.A. §1318(2), the Board has determined that the Motion to Seal should be granted in the least restrictive manner possible as follows.

The Board will make available to the public the redacted copies of all those documents in which patient privacy can be preserved by the simple redaction of words or phrases. The originals will be preserved under seal in their original state. Only those documents in which patient privacy cannot adequately be preserved by redacting will be sealed in their entirety, unless there is a waiver by the patient.

ORDER

In accordance with the Conclusions of Law and Decision set out above:

1. The State's Motion for Summary Suspension is **GRANTED** and, based on the Board's finding that public health, safety, or welfare imperatively requires emergency action, the license to practice medicine of Mitchell R. Miller, M.D., in the State of Vermont, is **SUMMARILY SUSPENDED**, pursuant to 3 V.S.A. § 814(c) and Board Rule 15.1(d), pending further proceedings in this matter for revocation or other final action.
2. **This order of SUSPENSION is entered and effective immediately.**
3. The hearing on the State's Specification of Charges filed in this matter will be scheduled as soon as practicable by the Board.
4. The State's Motion to Seal is **GRANTED** on the terms set out above.

FOR THE BOARD:

DATE:

Patricia A. King, M.D., Ph.D.
PATRICIA A. KING, M.D., Ph.D.,
Vice Chair, Vermont Board of Medical Practice

EFFECTIVE DATE: 4-1-09
DATE OF ENTRY: 4-3-09